RESERVED WATER RIGHTS COMPACT COMMISSION

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December 26, 2012

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RE: Eastern Montana Concerned Citizens and Counties' Response to Commission's CMR Draft Water Rights Compact.

Dear Ms. Lund,

Thank you for the comment letter you presented on behalf of your clients at the December 6, 2012 negotiation session. You raised a number of critiques of the draft Montana-USFWS CMR compact. I have attempted here to address each in turn. Where an issue has been raised repeatedly, I have attempted for the sake of brevity to consolidate my responses. If you have questions remaining, please do not hesitate to contact me.

1. Commission Authority to Negotiate Federal Reserved Water Rights.

In the "Eastern Montana Concerned Citizens and Counties' Response to Commission's CMR Draft Water Rights Compact" (the "Response"), you first assert that the Commission lacks authority to negotiate compact terms that do not comport with State water law. For this proposition you offer § 85-2-701, MCA, and selected language of the McCarran Amendment in support. You state, "[n]othing in the laws providing for the conclusion of a federal reserved water rights compact allows, authorizes, or otherwise sanctions the Commission acting beyond the bounds of the Montana Water Use Act." By this I presume you mean that the terms of the Draft Compact do not hold the Federal Government to the same standards for appropriation and use of water as would be required of a state-based user under the Montana Water Use Act. Neither the Montana Water Use Act nor federal law requires a federal reserved water right to be administered as a state-based appropriative right. The Montana Supreme Court explicitly rejected this proposition in *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 712 P.2d 754 (Mont. 1985).

The assertion that the Commission is empowered only to negotiate federal reserved water rights that comport with the law governing state appropriations is based on a fundamental misconstruction of the language of § 85-2-701, MCA, the McCarran Amendment, and the

Montana Water Use Act. Section 85-2-701, MCA, articulates the Legislature's intent in creating the Compact Commission. The sentence quoted in the Response states: "it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act." This statement makes *no reference* to the attributes of the water rights involved. The overarching intent is that these claims to tribal (and federal)[1] reserved water rights be negotiated in a "unified proceeding" as part of the statewide adjudication. The adjudication itself is governed by Montana law, but there was no legislative intent—nor is there language evidencing such intent—that federal reserved water rights be administered as state-based rights.

The McCarran Amendment waives federal sovereign immunity for the joinder of the United States as a defendant in general stream adjudications. It requires the federal government to comply with state law insofar as it governs the adjudication process. It *does not*, however, purport to limit federal reserved rights to the confines of state law.

The United States Supreme Court has determined that the waiver of sovereign immunity under the McCarran Amendment extends to the adjudication of federal reserved water rights in state court. The Court implicitly acknowledged the fundamental difference between federal reserved rights and state-based rights when it provided that in case of "a collision between [state-based rights] and any reserved rights of the United States" the federal government's interests would be protected through an ultimate right of appeal to the United States Supreme Court:

> All such questions, including the volume and scope of particular reserved rights, *are federal questions* which, if preserved, can be reviewed [by the U.S. Supreme Court] after final judgment by the Colorado Court.

U.S. v. Dist. Ct. In and For Eagle County, Colo., 401 U.S. 520, 526 (1971) (emphasis added).

In interpreting the McCarran Amendment in the context of federal reserved rights, the United States Supreme Court has recognized that state jurisdiction is neither exclusive nor determinative of the scope of federal reserved rights:

> Federal water rights *are not dependent upon state law or state procedures* and they need not be adjudicated only in state courts; federal courts have jurisdiction under 28 U.S.C. § 1345 to adjudicate the water rights claims of the United States. The McCarran Amendment did not repeal § 1345 jurisdiction as applied to water rights. Nor . . . is the McCarran Amendment a substantive statute, requiring the United States to "perfect its water rights in the state forum like all other land owners." The McCarran Amendment

[1] Section 85-2-703, MCA, applies the principles articulated in § 85-2-702, MCA to negotiations with the federal government over non-tribal reservations of land.

> waives United States' sovereign immunity should the United States be joined as a party in state-court general water rights' adjudication and the policy evinced by the Amendment may, in the appropriate case, require the United States to adjudicate its water rights in state forums.

Cappaert v. U. S., 426 U.S. 128, 145-46 (1976) (emphasis added, internal citations omitted).

The Montana Supreme Court has explained the distinction between federal reserved and state-based rights, and has illustrated the United States Supreme Court's holding that Federal reserved rights "are not dependent upon state law or state procedures" in the context of the Montana Water Use Act. The Court explained the origin and fundamental difference between the two types of rights as follows:

> Appropriative rights are based on actual use. Appropriation for beneficial use is governed by state law. Reserved water rights are established by reference to the purposes of the reservation rather than to actual, present use of the water.

Greely, 219 Mont. at 89-90, 712 P.2d at 762.

The Court has determined that the Montana Water Use Act on its face adequately provides for the state adjudication of federal reserved water rights:

> The Montana Water Use Act recognizes the distinction between federal reserved rights and state-created appropriative rights. Section 85–2–234(6), MCA, lists the information that shall be included in a final decree for a "federal agency possessing water rights arising under the laws of the United States." Three of the eight requirements are conditional: the purpose for which the water is currently used, if at all; the place of use and a description of the land, if any, to which the right is appurtenant; and the place and means of diversion, if any. Subsections (e), (f) & (g) of 85–2–234(6), MCA. *No conditional language is used in the list of required information for final decrees of state-created appropriative rights*. See § 85–2–234(5), MCA.

Greely, 219 Mont. at 98, 712 P.2d at 768 (emphasis added).

To the extent that the Water Use Act does not adequately provide for the adjudication of federal reserved rights, the Court recognized that federal law is determinative. The Court illustrated this principle in the context of abandonment, which is not described by the Water Use Act with reference to federal reserved rights:

> As noted above, federal law controls federal water rights. Current federal law does not permit abandonment of reserved rights for nonuse. As noted in Part II, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." The Water Court like any other court must follow federal

> law when federal law conflicts with state law. Unless and until federal law is changed, *a Montana decree of abandonment of a federal reserved water right would be improper*. We conclude that, to the extent necessary to fulfill the purposes of the reservation, federal reserved water rights cannot be decreed to be abandoned by reason of nonuse.

Greely, 219 Mont. at 99, 712 P.2d at 768 (emphasis added, internal citations omitted).

The Court then determined that the McCarran Amendment's waiver of sovereign immunity did not require federal reserved rights to be adjudicated or administered in accordance with state appropriative law:

> The McCarran Amendment altered federal procedural law by permitting state courts to adjudicate federal reserved water rights. Neither the McCarran Amendment nor any subsequent federal case interpreting that statute has modified substantive federal law. *Congress' grant of concurrent jurisdiction to the states to adjudicate federal water rights in no way diminished the nature of those substantive rights.* Based upon our analysis of the distinctions between federal reserved water rights, Indian reserved water rights, and state appropriative use rights and the manner in which the Water Use Act permits each different class of water rights to be treated differently, we hold that the Act is adequate on its face to allow the Water Court to adjudicate federal reserved rights.

Greely, 219 Mont. at 98-99, 712 P.2d at 768 (emphasis added).

The Court has since explicitly recognized the Commission's authority to negotiate such federal and tribal reserved rights under the same legal principles that govern their adjudication in *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner*, 278 Mont. 50, 923 P.2d 1073 (Mont. 1996). The Water Use Act has been amended to explicitly incorporate compact terms into the final decree of any federal reserved right achieved through the compact negotiation process. Section 85-2-236(7)(h), MCA.

Finally, if the Legislature had intended that the adjudication treat federal reserved water rights as though they were water rights existing under state law, there would be no need for the Compact Commission. The Legislature created the Commission because federal reserved rights are ***different*** from rights arising under state law, not because they are the same. If both categories of rights were the same, there would be no reason to segregate the federal rights from the state law rights and settle the federal rights out of court.

The Montana Supreme Court's holdings in *Greely* and *Ciotti* establish that the Commission possesses authority to negotiate federal reserved rights with the USFWS. These

negotiations are not confined to the parameters of state appropriative law, but are nonetheless within the bounds of the Montana Water Use Act.

2. Article I. The Fourth Recital

The Response correctly notes that in prior federal agency compacts negotiated by the Commission, there has not been an "additional statement or illustration of the purposes of the reservation" in the recitals. In the Response, you object to the Draft Compact's conclusion that the CMR "was done under a 'multiple use mandate'" "for the protection and improvement of public grazing lands and natural forage resources." The Commission generally tries to maintain consistency in the recitals and other "boilerplate" language between compacts. The language to which you object was specifically included to address concerns expressed by the public about range management practices on the CMR. Despite the fact that these issues are outside the scope of the Commission's authority to resolve, the Commission felt that it was important to emphasize that the negotiated settlement of the federal reserved water right is for the purposes encompassed by the executive order. Your concern has, however, been noted by the Commission and the USFWS. If both parties are amenable, this clause may be amended to achieve consistency with prior compacts.

I do want to take this opportunity to address briefly the concern which I believe underlies your critique and which you also reference in your comments on the "Instream Flow" definition. Based on your prior communications with the Commission, including your White Paper dated July 30, 2012, it is clear that you disagree with the Commission's interpretation of the purposes for which the Refuge was set aside by Executive Order 7509. I will not repeat the rationale for the Commission's position, as I believe it is adequately set out elsewhere[2] and is moreover based on the plain language of the Executive Order.

I would like to note, however, that the Commission's position is supported by the Department of Interior's interpretation of Executive Order 7509 and others like it. The Solicitor for the Interior, interpreting the purpose and extent of federal reserved water rights for the various agencies, noted that the three game ranges reserved under the Pickett Act of 1910 had virtually identical "purpose" language:

> [T]hey are hereby, withdrawn and reserved and set apart for the conservation and development of natural wildlife resources and for the protection of and improvement of public grazing lands and natural forage resources.

The Secretary concluded based on this language that:

[2] As set out in the Memo titled "The 'Primary Purpose' of Executive Order 7509 and Legal Basis for a Federal Reserved Water Right for the Charles M. Russell National Wildlife Refuge," dated June 15, 2012, available at: http://www.dnrc.mt.gov/rwrcc/Compacts/CharlesMRussell/PrimaryPurpose.pdf.

> It is reasonable to presume an intent to reserve water necessary for the conservation and development of wildlife, grazing and forage resources on these game ranges (e.g., irrigation, ecosystem food supply, breeding habitat, fire protection, erosion control), which are under the jurisdiction of the Fish and Wildlife Service.

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553 (D.O.I.), 1979 WL 34241.

The Solicitor's opinion comports with the Commission's interpretation of Executive Order 7509. As you are no doubt aware, the interpretation of an executive order by the Solicitor is entitled to the same deference as is the interpretation of a statute by the agency empowered to enforce it. *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005). The question of the reservation's purpose is not one of ambiguous language or conflicting terms, but rather a straightforward reading of the plain language of the Executive Order. As you acknowledge in the Response, the purpose for which the Fort Peck Game Range was reserved as articulated by Executive Order 7509 is "for the protection and improvement of public grazing lands and natural forage resources." As you also recognize, the Order stipulates how the *forage resources* of the range shall:

> *first* be utilized for the purpose of sustaining in a healthy condition a maximum of four hundred thousand (400,000) sharptail grouse, and one thousand five hundred (1,500) antelope, the primary species, *and such nonpredatory secondary species as may be necessary to maintain a balanced wildlife population*.

Executive Order 7509 (emphasis added).

Your reference to the Order in your "Response" selectively reads the first clause of this sentence without reference to the second. When construing an executive order, a court will read and interpret the order as a whole "without isolating specific terms from the context in which they are used." *City of Great Falls v. Morris*, 2006 MT 93, ¶ 19, 332 Mont. 85, 134 P.3d 692. Both clauses comprise the "primary" use to which the forage resource will be allocated—a concept that, as I have previously explained—bears no reference whatsoever to the primary purpose for which the refuge was reserved, which is simply "for the protection and improvement of public grazing lands and natural forage resources." The Order then goes on to state that the forage resources not utilized as provided above will be available for domestic livestock. This is the secondary purpose for which the forage resources are to be allocated. This language neither embodies the purpose for which the refuge was set aside, nor quantifies an amount of water consumable by 400,000 sharp-tailed grouse and 1,500 antelope.

3. Article II. Definitions

Your comments on the definitions of "Concurrent", "Instream Flow", "Protected Reach", "Stacked", and "Wildlife Habitat", insofar as they are predicated on an argument that these terms are "not recognized under Montana law and appear to be an overreach of the Commission's legislative grant of authority," are unfounded, as explained above. The Commission has the authority to negotiate, and the *legislature* the authority to adopt, compact terms sufficient to settle federal reserved water rights claims. As the Montana Water Use Act provides, and the Supreme Court has affirmed, these terms do not have to comport with state appropriative law. And, in any event, if the Legislature chooses to approve the Compact, it becomes state law itself, and a Court would be required to give both the Compact and the Water Use Act effect, not to construe one, especially the earlier one, as having precedence over the other.

Thus the adoption of definitions that help to illustrate the purpose of the federal reserved right are not only permissible but are necessary to differentiate the unique origin and purpose of these rights. The precatory language of Article II precludes the confusion you assert will ensue by the use of such definitions in the Compact: "for purposes of *this compact only*, the following definitions shall apply." Similar language is used in all of the Commission's ratified compacts. I have attempted below to address some of your more specific comments.

a. "Concurrent"

The term "Concurrent" has no relation to the concept of "Supplemental Irrigation" defined at ARM 36.12.1010. The definition, read in the context of Article V, Section D, clearly provides that the instream flow right in the Musselshell River is "non-cumulative" to any other right. As has been exhaustively explained in numerous public forums, the right in the Musselshell River will not diminish the current available water supply, will not be cumulative to the DFWP instream flow right, and will not be callable for any amount in excess of 70 cfs. The Compact language is not ambiguous on this point.

b. "Instream Flow"

The definition of "Instream Flow" is tailored to this Compact and reflects the Commission's authority to negotiate the terms of a federal reserved water rights settlement that differ fundamentally from state-based rights. The purpose of the instream flow right proposed for the Musselshell River and defined for in the Compact is for the purposes encompassed by Executive Order 7509. As evidenced by the plain language of the Order, that purpose is not confined to the amount of water 400,000 sharp-tailed grouse and 1,500 antelope can consume. The purpose encompasses both "non-predatory secondary species" and the

habitat necessary to sustain the enumerated and secondary wildlife species, as well as the forage required for domestic livestock.

c. "Protected Reach", "Stacked", and "Wildlife Habitat"

The discussion above outlines the clearly established legal principle that federal reserved water rights do not have to comply with state appropriative law. With regard to the substantive assertions regarding the on-stream impoundment limitation, I have addressed the Commission's authority to negotiate such provisions and the legislature's authority to implement them in the discussion on Articles III and IV below.

4. Article III. Water Right, and Article IV. Compact Implementation

In general response to your comments on Articles III and IV, the Commission has already proposed a number of edits to the Compact language in direct response to your clients' and the public's critiques received as oral and written comments. The Fish and Wildlife Service has agreed to a number of these amendments and is currently considering proposed changes to the language regarding the unquantified right, the quantified instream rights, the Musselshell River instream flow right, and the extent of the protected reaches referenced in Article III.F. and IV.C.

a. Priority Date and Purpose

The concept of "Wildlife Habitat" as a purpose has previously been recognized in § 85-20-801, MCA. Federal reserved rights are not, however, required to be confined to a recognized beneficial use under state law. *See e.g*. § 85-2-234(7), MCA; *Colorado River Water Conservation Dist.*, 424 U.S. 800, 824-825 (1976); *State ex rel. Greely*, 219 Mont. at 90, 712 P.2d at 762; *The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 2002 MT 280, ¶ 28, 312 Mont. 120, 59 P.3d 1093. Federal reserved water rights serve the purpose established by the enabling document. Here, the uses for which the rights are reserved are "stock, wildlife, and Wildlife Habitat." These uses comport with the purpose established by Executive Order 7509.

b. Quantified Rights

The Commission has presented and will continue to make available the data and rationale for the quantified instream rights. These flows represent an amount minimally necessary to sustain the wildlife, habitat, and forage on the refuge. These flows are not generally available for the full four-month period of use specified in the compact, but are available in amounts in excess of one-half or one cfs sometime during that period. When flows are not available, the FWS will not be able to make a call on junior users. Stored water may not be called by the FWS.

Your assertions that the Compact "may effectively operate as a closure of the basin" and that "the expansion of the period of use appears to effectively operate as a bar to any new appropriations after the compact is ratified" are patently incorrect. According to published hydrologic documents, the larger watersheds experience both mean monthly flow and peak runoff patterns that exceed the right sought by CMR. The volumetric yield from smaller watersheds can be significant as well. While estimating physical water availability is not an exact science, neither the Commission nor the DNRC are aware of evidence suggesting the basins are on the brink of closure.

The permitting of new water uses greater than the excepted limits for stock ponds and groundwater sources is rare across the drainages affected by the compact. Since 1991 approximately 90% of new appropriations in the proposed compact area have been uses excepted from permitting under § 85-2-306, MCA. The proportion of excepted to permitted new appropriations increased between 1991 and 2001, and this trend continues. New uses excepted from permitting will not be subject to call or objection by the Reserved Right. Moreover, new permitted uses are not precluded either explicitly or implicitly by the Compact terms. The quantified streams have modeled flows in excess of the quantified amount during the assigned period of use. As has already been explained, when flows are available, the USFWS will be entitled to their quantified amount. Flows over and above that amount are available for development by state appropriators. There is no scientific or legal basis on which to conclude that the Compact terms would operate as a de-facto basin closure.

The quantified rights have not been "changed" from a measurement point to a protected reach as asserted in the Response. There is a specified measurement point at which the right may be enforced and a place of use, which covers the stream length that falls within the CMR Refuge. This practice is no different from the places of use specified for other state-based stock-instream rights or instream flow rights.

The implementation provisions of Article IV.B. do not usurp authority from the DNRC or attempt to institute new permitting provisions as the "Response" suggests. The implementation language simply recognizes the existing process DNRC must undergo any time new permits are issued. The Compact language does not modify this process. The DNRC, not the Commission, is in charge of permitting, and no language in Article IV suggests otherwise.

c. Instream Flow Right on Musselshell River

The scope and limitations of the proposed Instream Flow right on the Musselshell River have been discussed above. With regard to the allegations that the Commission is

attempting to impose new permitting conditions and acting outside of its legislative authority, please see the preceding paragraph.

d. Wells, Ponds, and Springs

The inclusion of the wells, ponds, and developed springs for which the FWS has filed rights is based on the Commission staff's evaluation of previously established uses that comport with the purpose of the Refuge as articulated by Executive Order 7509. These uses currently exist on the refuge and are filed in the name of the FWS in the adjudication. The uses therefore are not part of the currently available water supply, and their inclusion in the Compact will not reduce the water supply available for future state-based appropriations. Their recognition under the terms of the draft Compact reflects the Commission's usual practice of attempting to consolidate the Federal Government's state based and reserved rights under the terms of a single compact. In this case, the consolidation works to the irrefutable advantage of state-based users in that many of these claims have a 1936 priority date, and will now be subordinate in priority to all state-based uses permitted before the Effective Date of the Compact.

e. Unquantified Right

The Commission has requested that the USFWS agree to remove the "unquantified right" provision from the Compact. The Commission is currently waiting for the USFWS' response to this request.

f. Conditions to be applied to permits issued after the Effective Date of the Compact

As explained above, the Compact makes no changes to existing permitting processes, and does not usurp permitting authority from the DNRC. The on-stream impoundment limitations change nothing about DNRC permitting process, but represent a reasonable restriction on the location of on-stream impoundments to help achieve the purposes of the Compact.

The mainstem impoundment limitation was proposed by the Commission as a mechanism to protect seasonal high flows that are attenuated by high concentrations of on-stream impoundments. The Commission proposed the impoundment limitation as an alternative to vastly increased quantified water rights that would otherwise be necessary to protect these flows. Commission staff has determined that these restricted reaches generally are not conducive to the construction of on-stream impoundments. Therefore the limitation will have relatively little impact on state-based users and will allow a much greater available water supply for future state-based development than could be achieved through the assignment of mean monthly flows sufficient to protect seasonal high flows. This

restriction does not purport to limit what any individual user may do with water to which they have a right, but instead places restrictions on how and where large impoundments of water (15 AF and greater) water may be constructed. As previously noted, such impoundments represent less than 10% of water development in the compact area.

The suggestion in the Response that such restrictions amount to a taking of private property is without legal foundation. In order for a taking to have occurred, the claimant must have a cognizable property interest protected by the Fifth Amendment of the United States Constitution, and that interest must have been taken. A *per se* regulatory taking occurs where government action completely deprives an owner of "*all* economically beneficial use. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Mere diminution in value does not constitute a taking. *Penn. Central Transportation Co. v. New York City*, 483 U.S. 104, 129 (1978). In this case the only potential interest affected by the restricted reaches is the right for an appropriator to *apply* for a permit to build a mainstem impoundment on one of the specified reaches. No existing water right is implicated and future development is not precluded. The Montana Supreme Court has held repeatedly that the right to apply for a permit does not constitute a cognizable property interest protected by the Fifth Amendment. See e.g. *Seven Up Pete Venture v. State*, 2005 MT 146, ¶26, 327 Mont. 306, 114 P.3d 1009; *Beasley v. Flathead County*, 2009 MT 121, ¶ 18, 350 Mont. 177, 206 P.3d 915.

The Court has held, moreover, that even where a cognizable property interest exists, a regulation imposed by the state that does not deprive a property owner of all economically beneficial use of that interest does not amount to a taking. *Buhmann v. State*, 2008 MT 465, ¶ 80, 348 Mont. 205, 201 P.3d 70, 90. In *Estate of Hage v. U.S.*, 687 F.3d 1281 (Fed. Cir. 2012), the United States Court of Appeals specifically held that where the government regulation at issue did not physically take water to which the plaintiffs had a right, government regulations regarding how and where the water could be used did not amount to a taking. Finally, both the legislature and the DNRC have closed numerous basins throughout the state, including the Upper Missouri, the Milk, and the Musselshell, to name only a few. These closures were instituted in order to *protect* existing water rights. While much more stringent than the terms of the draft compact, there has never been a successful claim that legislative or administrative basin closures amount to a taking.

The proposed mainstem impoundment limitation is analogous to the cases cited above in that it proposes a reasonable restriction on how and where water is put to use. There is no cognizable property interest subject to Fifth Amendment abrogation. Water users may still construct onstream impoundments less than 15 AF; they may still apply for a permit to construct onstream diversions accessing off-stream impoundments larger than 15 AF; and they may still apply for a permit to construct large off-stream impoundments upland or on

an unrestricted reach or tributary of a restricted reach. The proposed limitation does not deprive any individual of a property right. There is no taking.

The Commission has, however, recorded the public comment opposing the restricted reach provision. As you heard at the negotiation session on December 6, the Commission has asked the USFWS to limit the restricted reaches to contiguous public land adjoining the CMR so as to ameliorate the potential effect on private property. We await their response on this issue.

5. Conclusion

In closing, I would like to thank you once again for your comprehensive review and comments on the draft compact. Because this is a two-party negotiation, the Commission is able to incorporate public suggestions to the extent compatible with achieving a negotiated settlement; something the Commission has demonstrably done throughout this negotiation. While we are unable to adopt every change proposed by the public, we remain fully aware of the vital importance of public input in reaching a negotiated settlement.

Sincerely,

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